



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[AMS-SC-18-0018; SC18-981-3]

Almonds Grown in California; Amendments to Marketing Order 981

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rulemaking action amends Marketing Order No. 981, which regulates the handling of almonds grown in California. The three amendments, which were proposed by the Almond Board of California (Board), were approved by producers in a referendum. The amendments will change the dates associated with the Board's nomination process, modify the term of office start date for Board members, and add authority for future revisions to these provisions through the development of regulations using informal rulemaking.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Geronimo Quinones, Marketing Specialist, or Andrew Hatch, Rulemaking Chief, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or Email: Geronimo.Quinones@usda.gov or Andrew.Hatch@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or Email: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, finalizes amendments to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Order No. 981, as amended (7 CFR part 981), regulating the handling of almonds grown in California. Part 981 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." Section 608c(17) of the Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900) authorizes amendment of the marketing order through this informal rulemaking action.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action, it does

not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' " (February 2, 2017).

This action has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of entry of the ruling.

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110-246) amended section 608c(17)

of the Act, which in turn required the addition of supplemental rules of practice to 7 CFR part 900 (73 FR 49307; August 21, 2008). The amendment of section 608c(17) of the Act and additional supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. USDA may use informal rulemaking to amend marketing orders based on the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and any other relevant matters.

The USDA's Agricultural Marketing Service (AMS) considered these factors and determined that amending the Order as proposed could appropriately be accomplished through informal rulemaking.

The proposed amendments were unanimously recommended by the Board following deliberations at a public meeting held on December 4, 2017. A proposed rule soliciting comments on the proposed amendments was issued on July 2, 2018, and published in the *Federal Register* on July 6, 2018 (83 FR 31473). One comment was received, but it did not pertain to the proposal; therefore, no changes were made to the proposed amendments. A proposed rule and referendum order was then issued on November 7, 2018, and published in the *Federal Register* on November 14, 2018 (83 FR 56742). This document directed that a referendum among almond producers be conducted March 25, 2019, through April 5,

2019, to determine whether they favored the proposals. To become effective, the amendments had to be approved by two-thirds of eligible producers voting in the referendum or more than two-thirds of the volume represented in the referendum.

The three amendments were favored by at least 82 percent of the producers voting and by at least 89 percent of the volume represented, all of which exceed the requirements to pass.

The amendments in this final rule will change the dates associated with the Board's nomination process, modify the term of office start date for Board members, and add authority for future revisions to these provisions through the development of regulations using informal rulemaking.

Final Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 6,800 almond growers in the production area and approximately 100 almond handlers subject to regulation under the Order. Small agricultural service firms are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$7,500,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000 (13 CFR 121.201).

The National Agricultural Statistics Service (NASS) reported in its 2012 Agricultural Census that there were 6,841 almond farms in the production area (California), of which 6,204 had bearing acres. The following computation provides an estimate of the proportion of agricultural producers (farms) and agricultural service firms (handlers) that would be considered small under the SBA definitions.

The NASS Census data indicate that out of the 6,204 California farms with bearing acres of almonds, 4,471 (72 percent) have fewer than 100 bearing acres.

For the almond industry's most recently reported crop year (2016), NASS reported an average yield of 2,280 pounds per acre and a season average grower price of \$2.44 per pound. A 100-acre farm with an average yield of 2,280 pounds per acre would produce about 228,000 pounds of almonds. At \$2.44 per pound, that farm's production would be valued at \$556,320. The Census of Agriculture indicates that the majority of California's

almond farms are smaller than 100 acres; therefore, it could be concluded that the majority of growers had annual receipts from the sale of almonds in 2016-17 of less than \$556,320, which is below the SBA threshold of \$750,000. Thus, over 70 percent of California's almond growers would be classified as small entities according to SBA's definition.

To estimate the proportion of almond handlers that would be considered small businesses, it was assumed that the unit value per shelled pound of almonds exported in a particular year could serve as a representative almond price at the handler level. A unit value for a commodity is the value of exports divided by the quantity. Data from USDA's Foreign Agricultural Service showed that the value of almond exports from August 2016 to July 2017 (combining shelled and inshell almonds) was \$4.072 billion. The quantity of almond exports over that period was 1.406 billion pounds, combining shelled exports and the shelled equivalent of inshell exports. Dividing the export value by the quantity yields a unit value of \$2.90 per pound. Subtracting this figure from the NASS 2016 estimate of season average grower price per pound (\$2.44) yields \$0.46 per pound as a representative grower-handler margin. Applying the \$2.90 representative handler price per pound to 2016-17 handler shipment quantities provided by the Board showed that approximately 40 percent of California's almond handlers shipped

almonds valued under \$7,500,000 during the 2016-17 crop year and would therefore be considered small entities according to the SBA definition.

These amendments, which the Board unanimously recommended on December 4, 2017, will change the dates associated with the Board's nomination process, modify the term of office start date for Board members, and add authority for future revisions to these provisions through the development of regulations using informal rulemaking.

These amendments will have no direct economic effect on producers or handlers. Due to changes in the industry, the amendments are necessary to ensure the Board's ability to locally administer the program. Changing nomination dates, modifying term of office, and adding authorizing for future revisions will enable the Board to ensure a more efficient and orderly flow of business. It is anticipated that both small and large producer and handler businesses will benefit from these amendments.

The Board considered alternatives to the proposals, including making no changes at this time. However, this action will streamline the Order's operation by aligning Board membership with the beginning of the crop year. There will be no change to the composition of the Board.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0178 (Vegetable and Specialty Crops). No changes to those requirements are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

The Board's meeting was widely publicized throughout the almond production area. All interested persons were invited to attend the meeting and encouraged to participate in Board deliberations on all issues.

A proposed rule concerning this action was published in the *Federal Register* on July 6, 2018 (83 FR 31473). Copies of the proposed rule were sent via email to all Board members and almond handlers. It was also made available through the

internet by USDA and the Office of the Federal Register. A 60-day comment period ending September 4, 2018, was provided to allow interested persons to respond to the proposal. One comment was received, but it did not pertain to this proposal; therefore, no changes were made to the proposed amendments.

A proposed rule and referendum order was then issued on November 7, 2018, and published in the *Federal Register* on November 14, 2018 (83 FR 56742). This document directed that a referendum among almond producers be conducted March 25, 2019, through April 5, 2019, to determine whether they favored the proposals. To become effective, the amendments had to be approved by two-thirds of eligible producers voting in the referendum or by more than two-thirds of the volume represented in the referendum.

All three amendments were favored by at least 82 percent of the producers voting and at least 89 percent of the volume represented, all of which exceed the requirement to pass.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

**Order Amending the Marketing Order Regulating the Handling of
Almonds Grown in California¹**

Findings and Determinations

*(a) Findings and Determinations Upon the Basis of the
Rulemaking Record.*

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the Order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The Order, as amended, and as hereby further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The Order, as amended, and as hereby further amended, regulates the handling of almonds grown in California in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the Order;

¹This Order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

3. The Order, as amended, and as hereby further amended, is limited in application to the smallest regional production area that is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The Order, as amended, and as hereby further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of almonds produced in the production area; and

5. All handling of almonds produced in the production area as defined in the Order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

(b) Determinations.

It is hereby determined that:

1. Handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping of almonds covered under the Order) who during the period August 1, 2017, through July 31, 2018, handled not less than 50 percent of the volume of such almonds covered by said

Order, as hereby amended, have signed an amended marketing agreement; and

2. The issuance of this amendatory Order, further amending the aforesaid Order, is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of approval and who, during the period of August 1, 2017, through July 31, 2018, were engaged within the production area in the production of such almonds. Such producers also produced for market at least two-thirds of the volume of such commodity represented in the referendum.

3. The issuance of this amendatory Order together with a signed marketing agreement advances the interests of growers of almonds in the production area pursuant to the declared policy of the Act.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, all handling of almonds grown in California shall be in conformity to, and in compliance with, the terms and conditions of the said Order as hereby proposed to be amended as follows:

The provisions amending the Order contained in the proposed rule issued by the Administrator on July 2, 2018, and published in the *Federal Register* on July 6, 2018, (83 FR 31473) will be

and are the terms and provisions of this order amending the marketing order and are set forth in full herein.

List of Subjects in 7 CFR Part 981

Almonds, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

Dated: September 18, 2019.

Bruce Summers,

Administrator,

Agricultural Marketing Service.

BILLING CODE 3410-02 P

For the reasons set out in the preamble, 7 CFR part 981 is amended as follows:

PART 981 - ALMONDS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 981 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Amend § 981.32 by revising paragraph (a)(1) and adding paragraph (a)(3) to read as follows:

§ 981.32 Nominations.

(a) *Method.* (1) Each year the terms of office of three of the members elected pursuant to § 981.31(a) and (b) shall expire, except every third year when the term of office for two of those members shall expire. Nominees for each respective member and alternate member shall be chosen by ballot delivered to the Board. Nominees chosen by the Board in this manner shall be submitted by the Board to the Secretary on or before June 1 of each year together with such information as the Secretary may require. If a nomination for any Board member or alternate is not received by the Secretary on or before June 1, the Secretary may select such member or alternate from persons belonging to the group to be represented without nomination. The Board shall mail to all handlers and growers, other than the cooperative(s) of record, the required ballots with all necessary voting information including the names of incumbents willing to accept

renomination, and, to such growers, the name of any person proposed for nomination in a petition signed by at least 15 such growers and filed with the Board on or before April 1. Distribution of ballots shall be announced by press release, furnishing pertinent information on balloting, issued by the Board through newspapers and other publications having general circulation in the almond producing areas.

* * * * *

(3) The Board may recommend, subject to the approval of the Secretary, a change to the nomination method, should the Board determine that a revision is necessary.

* * * * *

3. Amend § 981.33 by revising the first sentence of paragraphs (a) and (b) and the last sentence of paragraph (c) and adding paragraph (d) to read as follows:

§ 981.33 Selection and term of office.

(a) Members and their respective alternates for positions open on the Board shall be selected by the Secretary from persons nominated pursuant to § 981.32, or, at the discretion of the Secretary, from other qualified persons, for a term of office beginning August 1. * * *

(b) The term of office of members of the Board shall be for a period of three years beginning on August 1 of the years selected except where otherwise provided. * * *

(c) * * * This limitation on tenure shall not apply to alternate members.

(d) The Board may recommend, subject to approval of the Secretary, revisions to the start date for the term of office of members of the Board.

[FR Doc. 2019-20533 Filed: 9/25/2019 8:45 am; Publication Date: 9/26/2019]